

1 Q Well, when I think of the word
2 "available" I think it means somebody can't
3 get it. Isn't that what available means?

4 A Well, this is sort of an issue in
5 the cable industry because they talk about
6 homes with cable, homes past with cables,
7 subscribers taking what past. So I think
8 we're getting into some --

9 Q Are we getting Blackberry
10 interference?

11 JUDGE SIPPEL: Let me interrupt a
12 minute. No, we're not getting black noise now
13 or white noise or anything. Can you speak up
14 a little bit, Mr. Tagliabue?

15 THE WITNESS: Yes, I'm sorry.

16 JUDGE SIPPEL: The microphone is
17 there. That's fine. Anything to assist.

18 THE WITNESS: Sorry.

19 JUDGE SIPPEL: Let us know how it
20 goes.

21 Is that better? We don't know yet.

22 THE WITNESS: Testing one, two,

1 three, four, five. Is that better?

2 JUDGE SIPPEL: Okay. Thank you.

3 BY MR. CARROLL:

4 Q All right. Now I'm back on
5 paragraph five. Do you still have it in front
6 of you, sir?

7 A Yes.

8 Q In the beginning of it, you say,
9 "Shortly after I retired from my position as
10 commissioner, Comcast took retaliatory steps."
11 You're not suggesting any connection between
12 your retirement and the retaliatory steps.
13 That's just a timing reference.

14 A Correct.

15 Q Okay. And now let me focus on the
16 retaliatory steps and you used the word
17 "retaliation" in the paragraph above. We're
18 going to get there in a second, too. The
19 retaliation you're referring to you're
20 referring to was the movement of the NFL
21 Network with the games from whatever
22 distribution level it had to the sports tier.

1 Agree?

2 A Yes.

3 Q That's what you're referring to.

4 A Yes.

5 Q Now under the 2004 contract,
6 Comcast had the right to move the program to
7 a sports tier, right?

8 A I thought I answered this. I
9 don't know what rights there were under that
10 contract other than what I had negotiated with
11 Mr. Roberts which focused on three things, an
12 opportunity to negotiate for the Sunday Ticket
13 Package, an opportunity to negotiate for the
14 Eight Game Package and the Video on Demand
15 arrangement that we put in place in the fall
16 of 2005. I think I said before that whatever
17 else was in that contract was worked out by my
18 senior executives without me having any
19 specific understanding of what's in there.

20 Q Well, Mr. Tagliabue, maybe not
21 specific but you knew there were tiering
22 rights in that contract, correct?

1 A I knew that we had been discussing
2 what Comcast's distribution obligations would
3 be if they took the live games versus what
4 their distribution would be if they passed,
5 not take the live games, but stuck with the
6 ancillary programming that was different from
7 the live game programming. That was something
8 that Mr. Roberts and I had talked about.

9 On various occasions he said that
10 he wanted to know that he would be in a most
11 favored nation position, that he wouldn't be
12 treated in terms of distribution any more
13 aggressively or differently than other major
14 system operators. At some points, he
15 suggested to me that he wanted to have a
16 preferred position in terms of distribution in
17 consideration of the fact that he was
18 negotiating with us on a network. It was sort
19 of a break-up fee or a preferred position in
20 consideration of good faith negotiations which
21 I never agreed to and wouldn't agree to. So
22 we did have those kinds of conversations about

1 distribution.

2 Q Do you remember my question?

3 A Yes, I just answered it.

4 Q What was the question?

5 A The question was did I have any

6 understanding that that contract included

7 tiering and did I have conversations about

8 tiering and I said yes.

9 Q I didn't ask you about
10 conversation. Is the answer that you
11 understood that the 2004 contract gave Comcast
12 tiering rights? Yes or no?

13 A I already answered that. I said I
14 don't know what that contract contemplated in
15 terms of tiering. I told you I had three
16 things that are covered in that contract that
17 I discussed with Mr. Roberts and understood
18 very clearly.

19 Q Didn't your own people --

20 JUDGE SIPPEL: Wait. Are you
21 finished?

22 THE WITNESS: No.

1 JUDGE SIPPEL: Let him finish.

2 THE WITNESS: I was just going to
3 repeat. The three things were that Comcast
4 would have a right to negotiate for the Sunday
5 Ticket Package within certain parameters, they
6 would have a right or an opportunity to
7 negotiate for the Eight Game Package within
8 certain parameters and that in the meantime we
9 would authorize Comcast to have a Video on
10 Demand service of NFL highlights. Beyond
11 that, what I now see in that contract was
12 negotiated by other people and I am not
13 familiar with what's in that contract.

14 BY MR. CARROLL:

15 Q Didn't those other people like Mr.
16 Hawkins tell you the contract is Comcast
17 tiering rights? You knew that, didn't you?

18 MR. PHILLIPS: He answered that
19 question.

20 JUDGE SIPPEL: Yes, that's asked
21 and answered.

22 MR. CARROLL: No.

1 BY MR. CARROLL:

2 Q Not the question did your own
3 people tell you that Comcast had tiering
4 rights under the contract?

5 A I just answered a few minutes ago
6 that they told me that Comcast had certain
7 distribution obligations if they elected to
8 take the wide games and they had different
9 distribution obligations if they didn't take
10 the wide games, but just stuck with the
11 ancillary programming.

12 Tiering to me is a technical term
13 that lots of other people used. I talk about
14 wide distribution, narrow distribution and
15 however that gets translated into tiering
16 concepts is for someone else to do who has a
17 much greater level of technical expertise and
18 business experience with the cable industry.

19 Q Mr. Tagliabue, do you remember at
20 your deposition two weeks ago I asked you
21 these questions about whether you knew there
22 were tiering rights?

1 A We had much of the same
2 conversation about two weeks ago. Yes, I do
3 remember that.

4 Q Do you remember at page 24 of your
5 deposition line 15 I asked you "Did you come
6 to understand they didn't get the Eight Game
7 Package, Comcast? There was a possibility
8 they might tier the distribution of the NFL
9 Network." Your answer line 19 "Yes."
10 Question line 20, "Did somebody tell you
11 that?" Answer line 21, "It was something that
12 I discussed with our people and we discussed
13 with our broadcasting committee."

14 A And it went on to say that I
15 talked about it with the broadcast committee
16 in terms of distribution, not in terms of
17 tiering. I do remember that.

18 Q Actually, let me read your
19 answer." Question, "Did Mr. Bornstein tell
20 you that?" Answer, "Yeah, Mr. Bornstein and
21 other people told me that they were in
22 conversation with Comcast about different

1 scenarios for tiering or not tiering the NFL
2 Network."

3 A Correct.

4 Q Okay. So you understood from your
5 people that there were situations under the
6 contract that Comcast had under which it might
7 be able to tier the distribution, correct?

8 MR. PHILLIPS: Your Honor, I'm
9 going to have to object.

10 THE WITNESS: Just if you finish -
11 -

12 JUDGE SIPPEL: Hold on.

13 MR. PHILLIPS: If you finish the
14 testimony that Mr. Carroll has not finished
15 reading here you would see that in fact Mr.
16 Tagliabue went on to talk about concepts of
17 distribution.

18 JUDGE SIPPEL: All right. Let's
19 do this. Let's give Mr. Tagliabue the page or
20 pages of the transcript and let him read them
21 to himself and then we'll go into the
22 questions.

1 MR. CARROLL: I have a copy.

2 JUDGE SIPPEL: Is that all right
3 with you, sir?

4 THE WITNESS: Yes, sir.

5 MR. CARROLL: Here's yours and,
6 Your Honor, I have one for you.

7 THE WITNESS: Page 19 was this?

8 MR. PHILLIPS: Page 24/25, Mr.
9 Tagliabue.

10 (Pause.)

11 JUDGE SIPPEL: What line are we on
12 to start with?

13 MR. PHILLIPS: I believe we
14 started with line 15, Your Honor. And Mr.
15 Carroll stopped at I believe line three of
16 page 25 without going onto the next Q&A.

17 MR. CARROLL: I have no objection
18 to the witness reading any additional Q&A
19 here, Your Honor.

20 JUDGE SIPPEL: Mr. Tagliabue is
21 reading what he said. You let us know when
22 you're ready, sir.

1 THE WITNESS: Okay. I've read
2 pages 24 and 25.

3 BY MR. CARROLL:

4 Q All right. Do you stand by the
5 testimony then?

6 A Yes.

7 Q Okay. And let me --

8 A And it carries over to 26 I might
9 add.

10 Q And there's more.

11 A Through line nine.

12 Q Let me try and summarize it this
13 way then. In 2006, you did not know whether
14 Comcast had the legal right under the 2004
15 contract to move the programming to its sports
16 tier. You did not know that one way or the
17 other.

18 A What I knew was what they had told
19 me and what we had discussed with Comcast that
20 if they took the live games they would give
21 them wide distribution. If they did not want
22 to give this service wide distribution, they

1 could elect not to take the live games and
2 take the shoulder programming. That was my
3 understanding.

4 Q Without having read the contract,
5 that was your understanding.

6 A Yes, as I said before, the
7 contracts, those contracts that were
8 negotiated in 2006 I don't know what they
9 provide because I wasn't involved with that
10 negotiation.

11 Q Okay. And is it correct? Do you
12 know this that in 2006 the NFL sued Comcast in
13 New York claiming that under 2004 contract
14 Comcast did not have the right to tier? Do
15 you know anything about that?

16 A I know the NFL sued Comcast. I
17 don't know when it was. It was after I left.

18 Q Okay. You didn't have anything to
19 do with the lawsuit.

20 A I have AL and BL, you know, before
21 leaving and after leaving.

22 Q Okay. Do you know whether that

1 lawsuit is over the contract and whether
2 under the contract Comcast has tiering rights?

3 A I understand that the contract has
4 -- The lawsuit has to do with a contract
5 between the NFL and Comcast or the NFL Network
6 and Comcast. I don't know what else the
7 lawsuit involves.

8 Q Okay. That's all you know about
9 it. So let me ask this question then going
10 back to your statement, paragraph five of your
11 written statement.

12 JUDGE SIPPEL: I think it would be
13 helpful for clarification purposes if nothing
14 else to get those marked, get those couple of
15 pages marked, as a cross examination exhibit
16 and put it in the record.

17 MR. CARROLL: That's fine, Your
18 Honor.

19 JUDGE SIPPEL: You could do it at
20 another point. You don't have to do it now.

21 MR. CARROLL: Over the break, the
22 first break, we'll have those pages removed

1 and separately marked and I'll put it into the
2 record for you.

3 JUDGE SIPPEL: Thank you.

4 BY MR. CARROLL:

5 Q So going back to Exhibit 214, your
6 written testimony, and the retaliation, the
7 retaliation you're identifying is that Comcast
8 moved the programming up to a sports tier.
9 Here's my question. In your view, is it
10 retaliation for somebody to exercise legal
11 rights they have under a contract?

12 A Not ordinarily but it could be if
13 it was done with the purpose or a motivation
14 to restrain competition unlawfully. So I
15 think the answer is ordinarily if you exercise
16 your contract rights you're okay. If you do
17 it with an ulterior purpose or as a sham or as
18 a cover for an anti-competitive it could be
19 problematic. I guess I'd have to go back and
20 do some legal research which I haven't done in
21 the last 20 years. But I think that probably
22 there is some restraint or trade cases where

1 something that would ordinarily be lawful if
2 done for an anti-competitive purpose or with
3 an anti-competitive intent could probably be
4 unlawful. That would be my understanding as
5 someone who used to practice law but is now a
6 layperson.

7 Q Okay.

8 JUDGE SIPPEL: Were you an
9 antitrust lawyer at one time?

10 THE WITNESS: Yes, I did a lot of
11 antitrust work.

12 JUDGE SIPPEL: Okay.

13 BY MR. CARROLL:

14 Q So ordinarily it's not retaliation
15 unless there's a certain intent that the
16 person has --

17 A Intent, purpose or effect. It
18 gets you into a lot of case law.

19 Q Okay. Are you meaning to opine on
20 any of that in paragraph five when you allege
21 this retaliation? Are you meaning to opine of
22 any of those issues?

1 A I am suggesting that when Mr.
2 Roberts told me that our relationships with
3 the cable industry are going to get very
4 interesting one of the things he was alluding
5 to was that the Versus network was going to be
6 competing with the NFL Network and he was not
7 particularly happy about that situation.

8 Q He didn't say that in the January
9 27th conversation, did he? Yes or no?

10 A We had had discussions that made
11 it clear to me that he was anxious to get a
12 deal done with the NFL so that the Versus
13 network would be the principal sports cable
14 network alternative to ESPN and he had made it
15 clear that if they didn't get the NFL then
16 they would be competing with the NFL and
17 that's not an outcome he was hoping for.

18 Q In the January 27th conversation,
19 the one that you testified to with your
20 counsel, the only thing he said was that -- In
21 fact, your words today, I want to get them
22 exactly. "It's an unfortunate decision and it

1 won't be positive for the relationship between
2 the NFL and the cable industry."

3 A Yep.

4 Q That's what he said to you in the
5 conversation on the 27th. Correct?

6 A Yep. It also said that our life
7 would be complicated and one of the
8 complications which I knew was that we would
9 be dealing with Comcast now just as a cable
10 MSO, but also in a network-to-network
11 competitor relationship. That was one of the
12 complications.

13 Q And that's what you understood.

14 A That was what I understood because
15 I'd been talking to the gentleman for more
16 than three months about all of these issues.
17 I knew what he was trying to accomplish and I
18 knew what he didn't want to be the outcome.

19 Q Do you know how much money Comcast
20 saved by moving the programming to a sports
21 tier?

22 A I don't.

1 Q Is it relevant in your view to a
2 notion of retaliation to understand whether
3 somebody saves money by exercising their legal
4 rights?

5 A I suppose it would be relevant if
6 someone did something contrary to their self
7 interest or something that was in their self
8 interest. But I don't have specific
9 information on that.

10 Q Ah. Do you know Mr. Hawkins
11 testified a few days ago that by his
12 calculation Comcast saved \$54 million by
13 moving the programming to the sports tier?
14 Are you familiar with that?

15 A No.

16 Q You don't have any reason to
17 disagree with that.

18 A I can't agree or disagree with
19 something that I have no knowledge about.

20 Q Isn't that the classic reason why
21 people have contract rights that when it's in
22 your self interest to exercise a contract

1 right to save you money that's what you do?

2 A Sometimes you agree in contracts
3 to things that aren't in your self interest.
4 They're in the other guy's interest, but you
5 do it as part of the package of things that
6 are mutually beneficial.

7 Q And you never looked at this
8 contract and in 2006 didn't know what this
9 contract provided for.

10 A Correct. That's what I've said
11 before.

12 Q And you had done no analysis of
13 whether as Mr. Hawkins has analyzed Comcast
14 saved \$54 million by moving it to a sports
15 tier.

16 A Correct. It was based primarily
17 on what Mr. Roberts had told me in my
18 conversations with him in late 2005 and early
19 2006.

20 Q Do you know about the conversation
21 Mr. Roberts had with Chairman Goodell? Mr.
22 Goodell succeeded you as commissioner,

1 correct?

2 A Yes.

3 Q Do you know about a conversation

4 Mr. Roberts had with Mr. Goodell in which they

5 talked about exactly that, how much money

6 Comcast saved?

7 A I don't know about such a

8 conversation.

9 Q So let me step back from the

10 Comcast situation and ask it this way now.

11 Imagine a hypothetical. It will be a simple

12 hypothetical though. Supposing you hire me as

13 your lawyer and we have a contract and the

14 contract is \$100 an hour. With me so far?

15 A Yes, sir. It's so farfetched I

16 can't imagine it, but go ahead.

17 (Laughter.)

18 Q Right.

19 A I've been paying legal fees for 20

20 years.

21 Q But we're use \$100. It's a nice

22 round number.

1 A It's an index.

2 Q It's an index. And under this
3 hypothetical in my contract after the end of
4 this year if this case is still going on I can
5 raise my fee \$50.

6 A Not any contract you negotiate
7 with me.

8 Q Indeed, you're a tough negotiator,
9 aren't you?

10 A I'm a fair negotiator.

11 Q You were tough with Mr. Roberts,
12 weren't you?

13 A I'm a fair negotiator. He's a
14 tough negotiator.

15 (Laughter.)

16 It's all in the eye of the
17 beholder.

18 Q Yes, it is in the eye of the
19 beholder. So we have this contract, \$100.
20 It's a great deal with you and I can raise my
21 rates by \$50 at the end of the year and
22 supposing I say to you later in the year and

1 this is true. I've never been to the Super
2 Bowl and I'd really love to get some Super
3 Bowl tickets and I say, "Could you get me some
4 Super Bowl tickets?"

5 A The answer is no.

6 Q Right. I know.

7 (Laughter.)

8 A If you want to pay for them, I can
9 put you in touch with the ticket manager.

10 MR. CARROLL: I know and
11 unfortunately I would probably never get Super
12 Bowl tickets after this case, Your Honor.

13 JUDGE SIPPEL: If you want to pay
14 for them, you might.

15 BY MR. CARROLL:

16 Q So you tell me no and then a week
17 later I exercise my rights under the contract
18 and I raise the fee \$50. Is that retaliation?

19 A I don't expect it would be, but
20 that's not what happened here because there
21 was the context for the conversations I had
22 with Mr. Roberts including the conversation

1 again January 27th.

2 Q You agree that in my hypothetical
3 I have every right to raise the rates even if
4 I'm unhappy with you for some other reason.

5 A I'm not sure I'd go that far, but
6 the example you gave me it doesn't seem like
7 there was any ulterior motive or any anger
8 kind of motive.

9 Q Do you think it's an ulterior
10 motive for Comcast to want to save \$54 million
11 a year?

12 A If that's the bonafide of the
13 basis for the decision and they are
14 contractually entitled to do that, then that's
15 their decision. But that's not the context in
16 which I had this conversation with Mr. Roberts
17 nor was it what I understood when I was
18 finished with the conversation.

19 Q You agree with me I think as you
20 just said that if they had the contract right
21 to do that and if that's the bonafides for why
22 they did it that would not be retaliation.

1 That would be proper, wouldn't it?

2 A Yes, because that rules out anti-
3 competitive motives.

4 Q Okay. We have reached our first
5 agreement.

6 Let me move forward to the next
7 paragraph in your written testimony, sir,
8 paragraph four. Paragraph four you say, "In
9 retrospect I believe that Mr. Roberts'
10 statement foreshadowed Comcast's retaliation
11 against the League and NFL Enterprises for the
12 League's refusal to license the Eight Game
13 Package to Comcast." Have I read it
14 correctly?

15 A Yes.

16 Q Okay. Now this is a little
17 convoluted, isn't it, because you say "In
18 retrospect, I believe Mr. Roberts' statement
19 foreshadowed"? Those are your words?

20 A Yes, but it's not convoluted.
21 It's clear.

22 Q All right. It's all in the eye of

1 the beholder, isn't it?

2 A No, it's in the eye of the author.

3 Q Are these your words? Did you
4 draft this?

5 A I drafted and approved this
6 affidavit. I'm not sure I drafted the first
7 paragraph which says who I am, but I certainly
8 drafted the paragraphs that deal with the
9 substance of my conversation with Mr. Roberts.

10 Q Okay. So these are your words "In
11 retrospect I believe that Mr. Roberts'
12 statement foreshadowed..." That's your word
13 choice, not your lawyer's word choice.

14 A Correct.

15 Q Okay. And is what that means -- I
16 want to focus first on the "In retrospect."

17 A Right.

18 Q That means looking back, right?

19 A Yes.

20 Q Okay.

21 A Looking back at what he said to me
22 in that conversation I now know specifically